LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 4 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 423

WILLIAM EZRIA POWELL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CALHOUN & KERNAGHAN
1116 Southern Finance Building
Augusta, Georgia 30902

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Reasons for Granting Writ	2
Statement of the Case	2
Questions Presented	3
Conclusion	6
Certificate of Service	7
Appendix A	8
Appendix B	10
Appendix C	11

LIST OF AUTHORITIES

	Page
Ballenbach v. United States, 66 Supreme Court 402	5
Cook v. U.S., C.A. 5th 67, 379 F.2d 966, 970; 23A C.J.S. Criminal Law 1393, pp. 1054-1055	5
U.S. v. DiMatteo, C.A. 3d, 1948, 169 F.2d 798	5

IN THE

SUPREME COURT OF THE UNITED STATES

No.-----

WILLIAM EZRIA POWELL,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM EZRIA POWELL, prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-stated case on June 20th, 1969.

OPINION BELOW

A copy of the opinion of the Court of Appeals for the Fifth Circuit is appended to this petition, and there was no opinion by the said Court when the petition for rehearing by the Court of Appeals was denied.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made on the 20th day of June, 1969, and a motion for rehearing was denied on the 11th day of July, 1969. A stay of the mandate was granted by the Court of Appeals for the Fifth Circuit until August 10th, 1969, in order that petitioner could file a petition for certiorari, and the jurisdiction of this Court is invoked under *28 USC, Section 1254.*

REASONS FOR GRANTING WRIT

The reasons for granting the Writ as expressed in *Rule 19* are presented here, to-wit: the decision of the Fifth Circuit is in direct conflict with decisions of the United States Supreme Court and with its own decisions, in that petitioner was found guilty of the overt acts of the conspiracy rather than the conspiracy count or substantive counts.

STATEMENT OF THE CASE

Petitioner, along with four other defendants, was indicted by the grand jury for the Southern District of Georgia in a seven-count indictment. The first count charged that all defendants entered into a conspiracy to violate the Internal Revenue liquor laws and contained five overt acts, which were also incorporated in substantive counts.

In addition to the conspiracy count, petitioner was charged in Count Two of the indictment with possessing one hundred fifty gallons of nontaxpaid liquor, in Count Five with possessing eighteen gallons of nontaxpaid liquor, in Count Six with possessing thirty gallons of

nontaxpaid liquor, and in Count Seven with possessing thirty gallons of nontaxpaid liquor. The jury returned a verdict of not guilty for all defendants on the conspiracy count, and found William Ezria Powell guilty of Count Seven, which alleged that on April 5, 1967, he sold thirty gallons of nontaxpaid liquor, the immediate containers thereof not having affixed thereto stamps evidencing that the tax had been paid on same in compliance with the provisions of Chapter 51 of the Internal Revenue Code of 1954, as amended on September 2, 1958, in violation of 26 U.S.C., Sections 5205(a)(2) and 5604(a)(1). Petitioner was sentenced to two years in custody of the Attorney General and given three years probation at the expiration of said sentence.

Within the time allowed by law, petitioner filed his notice of appeal to the aforesaid sentence, and the Court of Appeals denied petitioner's appeal on June 20th, 1969, and his motion for rehearing was denied on July 11th, 1969.

QUESTIONS PRESENTED

I. CAN PETITIONER BE SENTENCED TO TWO YEARS IN THE FEDERAL PENITENTIARY ON A JURY'S VERDICT WHICH FOUND HIM GUILTY OF AN OVERT ACT RATHER THAN A SUBSTANTIVE OR THE CONSPIRACY COUNT OF THE INDICTMENT.

Petitioner contends that his conviction on an overt act was illegal and resulted from those portions of the Court's original charge and portions of his recharge which misled and confused the jury to such an extent that it was impossible for them to return a legal ver-

dict. In his original charge, the Court stated (App. B, 21):

> "Now, what are the statutes involved? The first count which you will have out with you in the indictment is the conspiracy count, and it charges, as I have already said, that these defendants conspired to defraud the United States. If they did, that would be a crime within itself, *and they could be found guilty, not only of the conspiracy, but also of the overt act counts because they are different counts and they can be guilty of both of those crimes if they conspired, which they denied.*" (Emphasis added)

Pursuant to said charge, the jury returned the following verdict (App. B, 21):

> "We, the Jury, find the defendants not guilty on the conspiracy. Guilty on overt acts, two-dash-five. Not guilty on overt acts 1, 3 and 4. This 8th day of October, 1968. E. T. Hall, Foreman."

Subsequently, the jury was brought back into Court and requested further instruction, and the Court further confused the jury by giving this erroneous charge (App. B, 21, 22):

> "I am not sure what you mean. The Counts are all separate crimes. You do not have to find the defendants guilty of the conspiracy count, or any of the counts in the indictment, but you can find some of them or all of them *guilty or not guilty on the overt acts*, or substantive

> counts in the indictment, the other six counts, either one or all of the substantive counts." (Emphasis added)

Thereafter, the jury returned a verdict in which they found petitioner and some of the other defendants guilty of the overt acts, rather than the substantive counts of the indictment. The verdict read as follows (App. B, 22):

> "Guilty on acts 3, 4, 7. Not guilty 1, 2, 5, 6. E. T. Hall, Foreman."

The petitioner contends that the Fifth Circuit Court of Appeals has overlooked the following decisions which would require a different decision, in that the case of *Cook v. U. S.*, C.A. 5th 67, 379 F.2d 966, 970; 23A C.J.S., Criminal Law 1393, pp 1054-1055, held that there is no verdict so long as there is any uncertainty or contingency to the finality of the jury's determination.

Also, *U. S. v. DiMatteo*, C.A. 3d, 1948, 169 F.2d 798, stated that where there are separate counts in indictment or information, there must be separate verdicts by jury under proper instructions from Court as to guilt or innocence of defendant on each count if a judgment of conviction is to stand where there is an error in the record affecting one or more of the counts.

A case very similar to the present case is that of *Ballenbach v. United States*, 66 Supreme Court 402, which held that in a criminal trial, if the Judge's last-minute instructions is a special ruling on a vital question and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge; that where

a jury desiring additional instructions makes explicit its difficulties, a trial judge should clear them away with complete accuracy, and that a conviction ought not to rest on equivocal direction to the jury on a basic issue.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CALHOUN & KERNAGHAN

By:_____
William C. Calhoun
Attorneys for Petitioner

1116 Southern Finance Building
Augusta, Georgia 30902

CERTIFICATE OF SERVICE

I, WILLIAM C. CALHOUN, Attorney for William Ezria Powell, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1969, I served copies of the foregoing Petition for Writ of Certiorari on the parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with sufficient postage affixed, to William T. Morton, Esquire, Assistant United States Attorney, Post Office Building, Third Floor, Augusta, Georgia; and by mailing a copy of said petition in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

This _____ day of July, 1969.

_____

WILLIAM C. CALHOUN

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26975
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM EZRIA POWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

(June 20, 1969)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM: Pursuant to new Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v. Houma Well Service*,

5 Cir., 1969, ... F.2d ....., Part I (No. 26,902, slip opinion dated March 11, 1969).

U. S. A. v. WILLIAM EZRIA POWELL

This appeal is from a judgment of conviction entered on a jury verdict of guilty. The sole assignment of error rests on the proposition that the district court, in charging the jury, confused overt acts under a conspiracy count with the substantive counts of the same indictment. Appellant was convicted on substantive count seven charging a violation of the statutes relating to non-taxpaid liquor. The same activity alleged there was set out as an overt act under the conspiracy count but there was no overt act numbered seven.

The charge was confused by the court's reference in one instance to the substantive counts of the indictment as overt act counts. The jury at first returned only a partial verdict. Count seven was not considered. The jury was recharged and after further deliberation returned a verdict, in terms of sufficient clarity, finding appellant guilty as charged in count seven. We are convinced that the confusion in the charge such as it was, did not rise to the level of error.

AFFIRMED.

APPENDIX B

UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26975

D. C. Docket No. CR. 1802

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM EZRIA POWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia.

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was taken under submission upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 20, 1969

Issued as Mandate:

APPENDIX C

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26975
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM EZRIA POWELL,
Defendant-Appellant.

— — — — —

Appeal from the United States District Court for the Southern District of Georgia

— — — — —

(July 11, 1969)

ON PETITION FOR REHEARING

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

U. S. COURT OF APPEALS
F I L E D
July 11, 1969
EDWARD W. WADSWORTH
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 423

WILLIAM EZRIA POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on count 7 of an indictment which charged that on April 5, 1967, he sold thirty gallons of distilled spirits, the containers of which did not bear stamps evidencing payment of the required tax, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1). He was sentenced to two years' imprisonment to be followed by three years' probation. The court of appeals affirmed *per curiam* without oral argument.

The sole contention both below and in this Court rests on the assertion that there was fatal ambiguity in the verdict. In addition to the substantive offense

charged in count 7, petitioner was named as a member of the conspiracy charged in count 1. That count alleged five overt acts which were the acts charged as substantive offenses in other counts. Overt act #5 charged the identical conduct which was the subject of count 7. In his initial instructions, the trial judge charged that the defendants "could be found guilty, not only of the conspiracy, but also of the overt act counts because they are different counts" (R. 270). The jury returned with the verdict: "[N]ot guilty on the conspiracy. Guilty on overt acts 2–5. Not guilty on overt acts 1, 3 and 4" (R. 286). The trial judge told the jury that they could convict or acquit on the various counts of the indictment but not an overt act. He asked the foreman whether the jury had considered counts 6 and 7 and the foreman indicated that it had not (R. 286–287). The court then accepted the verdict of not guilty on the conspiracy count and sent the jury back for further deliberations after reinstructing them as to the difference between conspiracy and the violations alleged in the substantive counts. During its deliberations, the jury sent a note asking whether the counts could be "separated" (R. 290). The court in response gave the instruction set forth at Pet. 4–5 to the effect that the counts were all separate crimes and that the jury could "find some of [the defendants] or all of them guilty or not guilty on the overt acts, or substantive counts in the indictment, . . . either one or all of the substantive counts" (R. 290). The jury thereafter returned the verdict: "Guilty on acts 3, 4, 7. Not guilty 1, 2, 5, 6."

As the court of appeals observed (Pet. App. A, 9), there was no overt act numbered seven. It is clear, both from the prior context and the words used, that the jury's verdict, although rendered in terms of "acts," was a determination of guilt or innocence with respect to the seven counts contained in the indictment.[1]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

SEPTEMBER 1969.

[1] It is also clear from the initial defective verdict returned on the conspiracy count that the jury had initially concluded that petitioner did in fact commit the acts charged in count 7 which were alleged as overt act 5 in the conspiracy count.

U.S. GOVERNMENT PRINTING OFFICE: 1969